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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 825

OSMOND Y. LADD and PAUL H. TODD,
Petitioners,

vs.

BARTHOLOMEW A. BRICKLEY, Trustee of International Hydro-Electric System, SECURITIES & EXCHANGE COMMISSION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MILDRED HOWARD, A HOLDER OF PREFERRED STOCK OF INTERNATIONAL HYDRO-ELECTRIC SYSTEM, INTERVENOR-RESPONDENT

Opinions Below

The District Court rendered no opinion. There were no formal findings of fact and conclusions of law. The opinion of the Circuit Court of Appeals was filed November 14, 1946, but is not yet reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on or about November 19, 1946. Petition for certiorari was filed on December 30, 1946. The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code, as amended, by the Act of February 13, 1925, 28 U. S. C. A., Sec. 347-A.

Statement of the Case

The petition for a writ of certiorari filed by petitioners, Osmond Y. Ladd and Paul H. Todd, stockholders of the International Hydro-Electric System, seeks a review of the judgment of the Circuit Court of Appeals for the First Circuit, affirming a judgment of the United States District Court for the District of Massachusetts, which approved a settlement of certain lawsuits against the International Paper Company.

On November 13, 1944, Bartholomew A. Brickley was appointed by the Hon. Francis J. W. Ford, Judge of the District Court of the United States for the District of Massachusetts, Trustee of International Hydro-Electric System, and was directed to proceed to take such steps as were necessary to institute suit against International Paper Company, based on the cause or causes of action which International Hydro-Electric System may have against International Paper Company.

Thereafter the said Trustee carried on an extensive investigation and under date of November 1, 1944, filed a report setting forth the results of the said investigation and recommended that under appropriate orders from the Court, International Hydro-Electric System institute legal proceedings against International Paper Company in the Courts of the Commonwealth of Massachusetts, or in the United States District Court for the District of Massa-

chusetts, by intervening in litigation then pending, or by a bill in equity for rescission, or, in the alternative, damages, or for other equitable relief by an action at law for damages or by both a bill in equity and an action at law.

Thereafter, on or about January 25, 1945, the said Trustee instituted a certain action in the District Court of the United States for the District of Massachusetts (Civil Action No. 3280) against International Paper Company and Old Colony Trust Company, as Trustee of International Hydro-Electric System.

On or about January 27, 1945, the Trustee likewise commenced a certain suit in equity in the Massachusetts Superior Court for Suffolk County against the same defendants, wherein essentially the same relief was sought.

The Trustee in the lawsuits hereinabove referred to sought to rescind certain transactions relating to the sale of International Hydro-Electric System in 1929 and 1930 for shares of stock of New England Power Association and the sale in 1932 of certain water power, and, in the alternative, damages in the sum of approximately $96,000,000, together with interest.

At the time Bartholomew A. Brickley was appointed Trustee, as aforesaid, there were pending in the District Court two certain actions against International Paper Company and Old Colony Trust Company, as Trustee for International Hydro-Electric System, the first having been brought by Osmond Y. Ladd on or about July 19, 1943 (Civil Action No. 2405), and the other having been brought by Janet M. Condon on or about August 3, 1943, in the Superior Court for Suffolk County, but subsequently removed to the District Court (Civil Action No. 2503). The plaintiffs-shareholders of International Hydro-Electric System instituted the actions in the representative capacity of such shareholders in the right of International Hydro-Electric System.

Thereafter the said Trustee and officials of International Paper Company carried on negotiations for a long period

of time with a view of effecting a compromise and settlement of the litigation instituted by the said Trustee. On November 13, 1945, the Trustee entered into a certain agreement with International Paper Company, subject to the approval of the Court, providing terms and conditions for the disposal of all of said litigation. Under the terms of the said agreement the International Paper Company agreed to pay to the estate of International Hydro-Electric System the sum of $10,000,000, and further agreed to purchase from Hudson River Power Corporation, a subsidiary of International Hydro-Electric System, second mortgage bonds at par in the principal amount of not to exceed $3,000,000 and when, as and if issued by said corporation.

Thereafter, and on November 23, 1945, the Trustee filed in Civil Action No. 2430 a petition asking for approval of the settlement agreement and authorization to carry it out, and in his District Court action (Civil Action No. 3280) a suggestion asking for an order of notice with reference to the settlement, and in the *Ladd* and *Condon* cases a motion that he be permitted to intervene as a party plaintiff solely for the purpose of having the actions dismissed in accordance with the settlement agreement. In compliance with the order for notice issued by the District Court on the petition, the Trustee on November 24, 1945, mailed notice of the hearing set for December 17, 1945, to all interested parties. The District Court heard these motions beginning December 17, 1945, and continuing into three court days. Approval of the settlement was recommended by the Trustee by the Securities and Exchange Commission and by various holders of securities of International Hydro-Electric System. The settlement of the litigation was opposed by the petitioner Ladd and a small number of other security holders. A majority of the debenture holders, holders of preferred stock and holders of Class A stock in both number and amount were in favor of the settlement.

The District Court on December 26, 1945, approved the settlement and entered the decree and judgment appealed from. The decree in Civil Action No. 2430 recited that the settlement was for the best interests of the estate of International Hydro-Electric System and that the consideration was fair, reasonable and adequate. The agreement was approved and the Trustee was given the necessary authorization to consummate the settlement. Furthermore, it provided, among other things, for a dismissal of the *Ladd* case and the Trustee's District Court case subject, however, to a condition subsequent, which would reinstate them in the event that the compromise settlement was not consummated. A consent decree with a similar condition subsequently was entered in the Trustee's state court suit. International Paper Company paid the $10,000,000 to the District Court clerk, and executed and delivered the agreement to purchase the Hudson River Power Corporation bonds. Since the entry of the decree and judgment of the District Court the closing agreement has been received by the International Paper Company from the Treasury Department and all conditions to the settlement to be fulfilled by International Paper Company subsequently have been met.

On appeal the Circuit Court of Appeals affirmed the judgment of the District Court and on November 25, 1946, an order was duly made and entered staying the mandate until December 30, 1946.

Question Presented

Have the petitioners shown any grounds warranting the allowance of a writ of certiorari?

Summary of Argument

I—Petitioners have failed to show any grounds for the allowance of a writ of certiorari.

II—The District Judge, in approving the compromise, exercised a broad discretionary power, and the judgments of the courts below should not be reversed in the absence of a persuasive showing of gross and arbitrary abuse and more particularly since the record clearly shows that the District Judge acted for the best interests of the International Hydro-Electric System.

POINT I

Petitioners have failed to show any grounds for the allowance of a writ of certiorari.

A careful study of the questions presented at page 5 of the petitioner's brief shows clearly that no novel principle of law or question of public interest is involved and that there is no conflict between Circuit Courts of Appeals. There are not present in this case any of the grounds which the prior decisions of this Court have held were essential to move it to grant a writ of certiorari. The questions presented by the petitioner are not of the character that this Court has ruled must exist before it will exercise its power to review.

Forsyth v. *Hammond,* 166 U. S. 506, 514, 515 (1897).

Whether or not the compromise should have been approved depended essentially upon the appreciation by the District Judge of the questions presented, the difficulties of proof and probabilities of success or failure under the circumstances.

In *Houston Oil Company of Texas* v. *Goodrich*, 245 U. S. 440 (1918), the Court said:

> "The propriety of submitting these matters (to the jury) depended essentially upon an appreciation of the evidence. Having heard it all, the Trial Court concluded there was not enough in support of any one of petitioners' above stated claims to warrant a finding in their favor and the Circuit Court of Appeals reached the same result. 226 Fed. Rep. 434. The record discloses no sufficient reason within the rule long observed why we should review the judgment below."

The same rule was applied in *Boehmer* v. *Pennsylvania Railroad Company*, 252 U. S. 496, 498 (1920), in which case the question was whether certain acts of the carrier constituted negligence. Mr. Justice McReynolds, speaking for the Court, said:

> "Whether this constituted negligence depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances where two courts have agreed we will not enter upon a minute analysis of the evidence." *Chicago Junction Ry.* v. *King*, 222 U. S. 222.

The petition for a writ of certiorari should be denied on the authority of:

In re Riggi Bros. Co., 42 F. (2d) 174, 176; cert. den. *Wood & Selick* v. *Todd*, 282 U. S. 881.

Pullman Couch Company v. *Eshelman*, 1 F. (2d) 885; cert. den. 266 U. S. 631.

In re Orinoco Corp., 269 F. 344; cert. den. *Baxter* v. *Safford*, 256 U. S. 694.

In re Prudence Co., 98 F. (2d) 559; cert. den. *Stein* v. *McGrath*, 306 U. S. 636.

In re Van Camp Products, 95 F. (2d) 206; cert. den. *Shubrick* v. *Van Camp Products Co.*, 305 U. S. 605.

POINT II

The District Judge, in approving the compromise, exercised a broad discretionary power, and the judgments of the courts below should not be reversed in the absence of a persuasive showing of gross and arbitrary abuse, and more particularly since the record clearly shows that the District Judge acted for the best interests of the International Hydro-Electric System.

The authorities are unanimous in holding that a District Judge, in the exercise of jurisdiction over the affairs of a corporation, either in receivership or bankruptcy, has the discretionary power to approve the settlement and compromise of claims. The power has been frequently exercised in proceedings under Section 77-B.

In re Prudence Co., 98 F. (2d) 559 (C. C. A. 2, 1938).
In re McCrory Stores Corporation, 14 Fed. Sup. 739.
In re Burns Bros., 14 Fed. Sup. 910.

The existence of this power can hardly be denied. Therefore the real question presented here is whether in exercising his power the District Judge abused his discretion. All of the cases, including the action of the Circuit Court of Appeals in this case, are in harmony on this principle. Courts of review are uniformly reluctant to intrude upon the discretionary powers of the trial judge who is best qualified to appraise the conflicting contentions. This principle was applied in approving compromises in the following cases:

In re Riggi Brothers Co., 42 F. (2d) 174, 176 (C. C. A. 2, 1930).
In re Pullman Couch Co. v. *Eshelman*, 1 F. (2d) 885 (C. C. A. 4, 984).
In re Orinoco Corp., 269 Fed. 344 (C. C. A. 6, 1920).
In re Prudence Company, 98 F. (2d) 559.

That the District Judge has the right and, indeed, the duty to settle litigation has been stated by Circuit Judge Evans in the case of *In re Van Camp Products Company*, 95 F. (2d) 206, 208 (C. C. A. 7, 1938); cert. den. 59 S. Ct. 65 (1938), as follows:

> "• • • a breach of the parent company's obligation has, we think, caused counsel for appellants to overlook the unquestionable right (and we think the clear duty) of the court to settle sharply litigated questions in the interest of creditors and stockholders, although the exposure of those responsible for the unconscionable financing be not publicly made."

See also:

West v. *Radio-Keith-Orpheum*, 68 F. (2d) 869 (C. C. A. 2, 1934).
Drexel v. *Loomis*, 35 F. (2d) 800 (C. C. A. 8, 1929).
American District Steam Co. v. *Waltermire*, 231 Fed. 412 (C. C. A. 6, 1916).
In re National Artificial Silk Co., 272 Fed. 938 (C. C. A. 6, 1921).

The only action taken by the District Judge was the approval of a settlement of claims on behalf of the System. The settlement made it unnecessary to decide any questions of local or federal law. No question of general importance is presented. The consideration by the Court of the existence of disputed facts and law, the certainty of litigation and appeals and the uncertainty of their result was sustained in the case of *In re Riggi Bros. Co.*, 42 F. (2d) 174. All of the decisions which have reviewed the discretionary acts of a District Judge in approving a compromise comment upon the axiomatic fact that compromises are justified because expense and delay are thereby avoided.

In *In re Van Camp Products Company*, 95 F. (2d) 206, 209, the Circuit Court of Appeals for the Seventh Circuit commented upon the natural desire of the Court to

respect the wishes of the parties and avoid a waste of assets in protracted litigation.

The following excerpts from the record show conclusively that the learned District Court acted on reasonable grounds in approving the settlement:

BRICKLEY—Page 365

"I have little more to add, if your Honor please, except to say this, that in connection with the recommendation which I have made to your Honor I considered all the facts which were in my possession and which resulted from the investigations which I have already stated. I considered the law involved and the possibilities, the probabilities and the possibilities, and because the Hydro System matter as it is before your Honor is purely a liquidating proposition, I considered the advisability of the recommendation and the effect which a settlement would have in connection with the liquidation, the favorable liquidation of other Hydro assets which I may say to your Honor ran into several millions of dollars. I have not the slightest hesitation in saying to your Honor that in my judgment this settlement is the wise thing for the Hydro System to do. I think it is fair and reasonable and just, and for that reason I am now before you recommending it is fair and reasonable to your Honor."

BRICKLEY—Page 369

"Q. My last question. Why, in your opinion, in connection with this settlement, in view of the causes of action that you set forth in your complaint, and particularly in the amended complaint, why do you believe that $10,000,000 and the loan of $3,000,000 is fair instead of more money? A. Because I think there are very serious questions on the facts and very serious questions on the law, and that the payment of $10,000,000 at this time is such a sum as we should accept under all the circumstances."

BRICKLEY—Page 379

"Except, Mr. Whiteside, I want to make it very plain that before I made this recommendation I con-

sidered every fact which I had, which had come to me, in writing, orally, as a result of my own investigation; and I considered the law as I understood it in the application to the facts which we had. And it was as a result of those things, plus a consideration as to the likelihood of recovery, plus the beneficial or unfavorable effect upon Hydro in connection with this settlement—and I took into consideration everything that I could conceivably take, and then make up my mind as to what I should do."

BRICKLEY—Page 387

"I should say that we had a subsequent conference which resulted in our getting an offer of ten million dollars, I mean we were presented with another amount, but we sought a further conference as a result of which we were able to add to that the loan of $3,000,000 to the Hudson River Power, and I felt that when we reached that point the Paper Company would absolutely stop, and we could not get one additional dollar, and that therefore it was then incumbent upon me to report the matter to the Court and to recommend it or to refuse to recommend it."

BUCKMAN—Pages 400-401

"There is no question that every security holder would like to receive or see System receive the greatest amount of money possible from Paper Company. In the last analysis it will be for their own benefit as security holders of the corporation. I wish to point out to the court that on the preferred stock that my clients own there is an accumulation of $38.50 per share as of July 15th of this year; but at the same time, your Honor, one must keep in mind that any lawsuit has its danger. There is no such thing as certainty as to outcome. And we do know that the affairs of System are such that an offer of this amount is substantial. * * *

"In conclusion, I will reiterate the position of my clients being in consonance and consistent with the trustee's recommending this settlement."

SIEGELTUCH—Page 407

"He has directed me to say to your Honor that he approves of this settlement in toto. He feels that he cannot possibly overlook a large amount of money like ten million dollars, which is a considerable amount of money, in view of the fact that he feels that the vicissitudes of litigation are certainly such that under the circumstances in this case, with all the questions involved, the question of the statute of limitations and the question of the factual proof that might have to be gone into and the difficulties in proving them, he feels that he is serving the best interests of his client in approving this settlement."

YOHALEN—Page 461

"What I do say is that it is the view of the Commission that ten million dollars plus the other commitments brings this settlement within the area where it can be and should be approved."

YOHALEN—Page 466

"In any event, I think it is your Honor who is in that position; but, so far as I am concerned, my position on behalf of the Commission is that a figure in this magnitude, reached at arm's length by people of such eminence and qualification as Mr. Brickley, assisted by Mr. Hoar and his associates, after the kind of investigation which there has been—and that of course includes the cooperation for what it has been worth that they have had from the Commission's staff—as I say, a figure of ten million dollars arrived at that way merits the sympathetic action of the court. So I do not see how any question that Mr. Whiteside can put to me and which I might answer would be of any assistance to the court."

The Circuit Court of Appeals, after a careful study of the various contentions of the petitioners, could find nothing to justify it in reversing the judgment and decree of the District Court in approving the settlement. Naturally, we concur in the able and exhaustive opinion of the court

below. Judge Goodrich, speaking for the Court, correctly and effectively showed that the contentions made by the petitioners are entirely untenable, and under the circumstances we deem it unnecessary to discuss any further the arguments made by the petitioners in this Court in support of their position. Briefly stated, we are unable to perceive of any proper ground upon which the action of the courts below can be overruled.

CONCLUSION

There is no principle of law which suggests or requires the reversal of the judgment of the courts below, and that under the law and on the basis of the record, no reason exists for the allowance of a writ of certiorari, and that the petition should accordingly be denied.

Respectfully submitted,

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